

ADJUDICATIVE DISCRETION

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The Ontario Securities Commission is responsible for administering and enforcing the Securities Act and the Commodity Futures Act. Most of its activities relate to the former.

Section 1.1 of the Securities Act (which I will refer to as the Act) states the purposes of the Act to be

- a) to provide protection to investors from unfair, improper and fraudulent practices and
- b) to foster fair and efficient capital markets and confidence in capital markets.

Under section 2.1, in pursuing these purposes the Commission is obligated to have regard to a number of principles, one of which is that balancing the importance to give to each of the two purposes may be required in specific cases.

To enable the Commission to meet its obligations under section 1.1, the Act gives the Commission a number of public interest discretions.

Two of the principal activities of the Commission are the registration (which could be called licensing) of market intermediaries such as brokers, investment dealers, mutual fund dealers and investment advisors, and of their trading and advice-giving employees, and the review and acceptance of prospectuses offering securities to the public. With respect

to the registration function, the Director (that is one of a number of Commission staff members designated as a ADirector@) is required to grant registration to an applicant where in the opinion of the Director the applicant is suitable for registration and the proposed registration is not objectionable. As regards prospectuses, the Director is required to issue a receipt for the prospectus unless it appears to the Director that it not in the public interest to do so, except in a number of situations where a receipt may not be issued. As you will see, the Director has wide discretion in both cases, subject to a review, on the application of a person affected, by a panel of Commissioners, with appeal rights to the Courts.

Section 74 of the Act authorizes the Commission to rule that the prospectus and registration requirements of the Act do not apply in a specific situation where it is satisfied that to do so would not be prejudicial to the public interest, and such a decision is not subject to appeal.

But the principal weapon in the Commission's armoury in the enforcement of the Act is section 127, which authorizes the Commission to make one or more of the following orders if in its opinion it is in the public interest to do so:

1. An order that the registration or recognition granted to a person or company under Ontario securities law be suspended or restricted for such period as is specified in the order or be terminated, or that terms and conditions be imposed on the registration or recognition.
2. An order that trading in any securities by or of a person or company cease

permanently or for such period as is specified in the order.

3. An order that any exemptions contained in Ontario securities law do not apply to a person or company permanently or for such period as is specified in the order.
4. An order that a market participant submit to a review of his, her or its practices and procedures and institute such changes as may be ordered by the Commission.
5. If the Commission is satisfied that Ontario securities law has not been complied with, an order that a release, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular, offering memorandum, proxy solicitation or any other document described in the order,
 - i. be provided by a market participant to a person or company,
 - ii. not be provided by a market participant to a person or company, or
 - iii. be amended by a market participant to the extent that amendment is practicable.
6. An order that a person or company be reprimanded.

No such order may be made, except on an interim basis, without a hearing subject to section 4 of the Statutory Powers Procedure Act, and any such order may be appealed to the Courts.

The balance of these remarks will deal with the Commission's section 127 powers.

In exercising these powers, the Commission almost always gives extensive reasons for decision, and a substantial body of case law, both Commission and Court, now exists with respect to the exercise of these public interest discretionary Powers. Although subsequent panels are not, of course, bound by Commission decisions, these are nevertheless extensively quoted from in subsequent decisions, and do provide guidelines to the public as to when and how the Commission is likely to exercise its section 127 powers.

A 1995 decision of the Commission, *In the Matter of E.A. Manning Limited et al.*, summarizes the considerations involved in exercising these powers and contains the following statements:

The regulatory nature of proceedings of this type was described by the Divisional Court in *Gordon Capital Corporation v. Ontario Securities Commission* as follows.

The general legislative purpose of the Act and the OSC's role thereunder is to preserve the integrity of the capital markets of Ontario and protect the investing public. In this context, the proceedings against Gordon and Bond under subsection 26(1) of the Act are properly characterized as regulatory, protective or corrective. The primary purpose of the proceedings is to maintain standards of behaviour and regulate the conduct of those who are licensed to carry on business in the

securities industry. The proceedings are not criminal or quasi-criminal in their design or punitive in their object. This distinction has been made in a number of cases involving proceedings of a regulatory or public protective nature such as that under Subsection 26(1) of the Act.®

The Commission, in *In the Matter of Trend Capital Services Inc. et al* outlined the basis on which the Commission should proceed.

AStaff, in the Notice of Hearing which initiated these proceedings, have asked the Commission to sanction the Respondents for a variety of alleged activities all of which involved the sales of shares of Thunder Bumpers to members of the public.

In making an order under either of these statutory provisions [i.e. the provisions which corresponded to clauses 127(1) 1. and 3.], the Commission must come to the opinion that it is in the public interest to do so. The Courts and the Commission in prior hearings have established guidelines as to when and in what circumstances the discretion vested in the Commission by the Act should be exercised. It has long been recognized that the Commission's jurisdiction and consequently its responsibility under section 27(1) of the Act is very broad. In the case of Re the Securities Commission and Mitchell, Laidlaw, J.A. said

AThe Commission has the right to suspend or cancel registration of any person, notwithstanding the fact that there has been no breach of any provision of The Securities Act or any regulation made thereunder.®

and

AFinally, the Commission may properly form its opinion to suspend or cancel any registration in the public interest without proof of actual injury to the public.®

The Commission itself has repeatedly held that the discretion vested in it should be exercised in favour of making an order where the evidence establishes that there has been a reasonable likelihood that such conduct may continue in the future unless the Commission moves to prevent a recurrence. Examples of this view of the Commission may be found in the recent decisions of Re Mithras Management Ltd. and Re Gordon Capital Corporation and David Bond. The latter decision of the Commission was upheld by the Divisional Court.

Arguments were addressed as to the standard of proof which we should apply, having regard to the fact that in this hearing we may well be considering sanctions affecting the ability of people to earn their livelihood. In our view the burden of proof rests with staff of

the Commission to establish to the satisfaction of the panel that it is obliged, in order to protect the public interest, to sanction the Respondents. We in determining this have had to balance the interest of the Respondents in their right to earn a living in the investment industry and, in the case of Trend, to run a business and employ approximately 50 people, against our obligation to protect the public interest.

Both sections of the Act under consideration require us to form an opinion that a decision to sanction is in the public interest. In our opinion there are two issues which require consideration. The first, already mentioned, is whether or not, assuming the conduct is objectionable, there is a reasonable likelihood it will be repeated. The second is whether or not the conduct of the Respondents, if objectionable, is such as to bring into question the integrity and reputation of the capital markets in general. These were the tests which we followed in reaching our conclusions.®

In considering whether sanctions were appropriate, the Commission went on to say:

In the matter of Mithras Management Ltd. et al the Commission set out the relevant considerations as follows:

Under sections 26, 123 and 124 [now section 127] of the Act, the role of this Commission is to protect the public interest by removing from the capital markets -- wholly or partially, permanently or temporarily, as the circumstances may warrant -- those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under Section 118 of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all. And in so doing, we may well conclude that a person's past conduct has been so abusive of the capital markets as to warrant our apprehension and intervention, even if no particular breach of the act has been made out. Equally, however, even if there has been a technical breach of the Act, we may well conclude that, in the circumstances, no sanction is necessary to protect the public interest.®

In Manning, the Commission terminated the registration of several respondents, and decided that the exemptions contained in Ontario securities law would not apply to them in the future.

Certain of the respondents appealed the decision, basically on the grounds that it was improper for the Commission to remove exemptions on a wholesale basis and to fail consider whether it was in the public interest to remove only some exemptions. O'Driscoll, J. speaking for the Divisional Court, said the following:

In Pezim v. British Columbia (Superintendent of Brokers), [a decision of the Supreme Court of Canada] Iacobucci J., for the court, spoke of the courts giving curial deference to decisions of a securities commission, decisions which go to the core of its regulatory mandate and expertise even where a statutory right of appeal exists. Many parts of the judgement were read to us during the course of the submissions; I refer to three excerpts:

[S]ecurities regulation is a highly specialized activity which requires specific knowledge and expertise in what have become complex and essential capital and financial markets.

Consequently, even where there is no privative clause and where there is a statutory right of appeal, the concept of specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunals' expertise.

The majority of the Court of Appeal [of British Columbia] erred in failing to appreciate the Commission's role in an area requiring special knowledge and sophistication. It also failed to recognize the Legislature's intent to confer a broad public interest mandate on the Commission to carry out its role.

We are not persuaded that there is any ground upon which to reverse or interfere with the decision of the OSC. We find that the OSC acted in good faith. We find that the OSC acted in accordance with the objects of the Act. The mandate of the OSC is both to protect the investing public and protect the integrity of capital markets.®

^We find that the Commission considered all relevant factors in making its decision. We find that considerable deference must be given to the impugned decision and orders of the OSC because of the its expertise in that area and because the matters it was deciding

came squarely within its expertise. We find that under s. 127(1) 3 of the Act, the OSC's power to remove any exemption includes the power to remove all exemptions and the OSC is not required to give individual consideration as to whether each exemption applies to a particular appellant.

We agree with paragraphs 47 and 48 of the Respondent's Factum:

47. There is no right of any individual to participate in the capital markets in Ontario. Section 35 of the Act provides certain exemptions which allow individuals to make certain trades without being registered, however the OSC has explicit jurisdiction to remove the exemptions if an individual engages in conduct contrary to the letter or spirit of the Act, whether such conduct causes damage to investors or is detrimental to the integrity of the capital markets. The OSC found that such conduct existed on the facts of the present case.
48. The OSC exercised its public interest discretion in a manner within the core of its regulatory jurisdiction. Its decision was based on voluminous evidence, made in good faith, for the purposes of the Act and on the basis of relevant factors. It is a matter that falls within the OSC's exclusive jurisdiction and one with which the Court should not interfere.

The removal of the exemptions of the appellants, in our view, falls within the OSC's exclusive jurisdiction. On this record, we are not persuaded that there is any basis upon which to interfere. In the result, the appeals are dismissed.

As you will see from what I have said, the Commission's section 127 powers are bottomed on the protection of the public interest which, under section 1.1, involves the protection both of investors and of the capital markets. However, since certain of those powers enable the Commission to deprive a registrant of the ability to earn a living in his or her chosen field of endeavour, the Commission must also be especially mindful of the rights of the respondent in these cases. This involves a three way balancing act, involving investors, the capital markets and the registrant, but in the normal case the interests of investors and the marketplace point in the same direction, since the credibility of the

marketplace depends in no small measure on investors perceiving that their interests are being protected in the marketplace.

As you may know, in 1994, the Commission was given the power to make, subject to Ministerial approval, rules which are legally binding subordinate legislation. In 1997, it was argued, in *Marchment & Mackay Limited et al. v. Ontario Securities Commission*, that the Commission, as a result of its rule making power, could not exercise its section 127 jurisdiction without first making rules covering the subject matter complained of. Southy, J., speaking on behalf of the Divisional Court, had the following to say on the matter:

"The applicants emphasize that the failure to make rules under the amendment to s.143 of the Act has occurred despite the recognition in Policy 1.10 of the need for such rules and the existence in the policy of detailed provisions which could readily be converted into proposed rules. In these circumstances, in the submission of the applicants, it is unjust and beyond the powers of the Commission to attempt to regulate trading in penny stocks by an adjudicative process under its public interest jurisdiction under s.127 of the Act. I do not agree.

Section 143 of the Act, as amended, provides only that the Commission may make rules in respect of the following matters: ...". Section 29(2) of the *Interpretation Act*, provides that the word 'shall' shall be construed as imperative and the word 'may' as permissive. But the application of that rule of construction is subject to the exception contained in s.1 of the *Interpretation Act* respecting provisions inconsistent with the intent or object of the Act being interpreted, or which would result in an interpretation inconsistent with the context. Mr. Dunne argued that the word 'may' in s.143 should be construed as imperative in all the circumstances. He relied also on the decision of the Supreme Court of Canada in *Labour Relations Board of Saskatchewan v. The Queen ex rel F.W. Woolworth Co. Ltd.*, where Locke J. said at p. 87: "Enabling words are always compulsory where they are words to effectuate a legal right."

The Saskatchewan case was one upholding a judgement for a writ of mandamus to compel the Saskatchewan Labour Relations Board to proceed to determine the application of certain employees for the de-certification of a union. Unless the Board proceeded, the

rights of the employees respecting the choice of a bargaining agent would be ineffective. I cannot accept that any rights of the applicants in the case at bar are being rendered ineffective by the fact that the OSC has not exercised its powers to make rules.

As to the wording of s. 143, it is my opinion that the legislature would have used imperative words if it had intended to make the rule-making power mandatory. It could have used the word *shall*, but it did not do so.

Similarly, if the legislature had intended to divest the Commission of its power to regulate trading in penny stocks under the public interest provisions of s. 127, it could have easily done so by express words. Again, it did not do so. If it had intended that the rule-making authority replace the authority under s. 127, one might have expected that a date be named by which the Commission was required to promulgate its rules.

If the submission of the applicant is correct, there has been a regulatory holiday from the time the rule-making powers were granted under s. 143 (January 1, 1995) until the date in the future when rules are in fact made. At the present time, there are no rules under s. 143 and, if the applicants are right, the Commission has no authority to use the public interest provision under s. 127 to regulate trading. That result does not appear reasonable.

For the foregoing reasons, I am not persuaded that s. 143 should be interpreted as imposing on the Commission a mandatory requirement to make rules, or that it should be interpreted as restricting the scope of the Commission's public interest jurisdiction under s. 127.

The broad discretion given to the Commission under s. 127 was recognized by this Court in *Gordon Capital Corporation v. Ontario Securities Commission* where Craig J., delivering the judgement of the court, said the following at p. 211:

There is no definition of the phrase *the public interest* in the Act. It is the function and duty of the OSC to form an opinion, according to the exigencies of the individual cases that come before it, as to the public interest and, in so doing, the OSC is given wide powers of discretion.

The scope of the OSC's discretion in defining *the public interest* standard under sub. 26(1) is limited only by the general purpose of the Act, being the regulation of the securities industry in Ontario, and the broad powers of the OSC thereunder to preserve the integrity of the Ontario capital markets and protect the investing public.

Based upon the activities, the OSC should be accorded a particularly broad latitude in formulating its opinion as to public interest in matters relating to

the activities of registrants such as Gordon under subs. 126(1) [now subs. 127(1) of the act. @

So, absent bad faith or an improper purpose, it seems unlikely that an exercise by the Commission of its public interest discretion under section 127 will often be disturbed by the Courts, which, as you have seen, have given a very broad reading to the basis on which the Commission may properly exercise its discretion.